STATE OF NEW YORK
COUNTY OF CORTLAND SUPREME COURT

Present: Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice

In the Matter of the Application for a Judgment Pursuant to Article 78 of the Civil Practice Law Rules of:

DECISION AND ORDER

PAMELA JENKINS, CHERI SHERIDAN and OLGA SMITH,

Petitioners,

v.

Index No. 2015-720

LEACH PROPERTIES, LLC, LEACH'S CUSTOM TRASH SERVICE, SUIT-KOTE CORPORATION, TOWN OF CORTLANDVILLE ZONING BOARD OF APPEALS, TOWN OF CORTLANDVILLE PLANNING BOARD, and TOWN OF CORTLANDVILLE TOWN BOARD,

Respondents.

The instant Decision and Order is in furtherance of this Court's March 18, 2016, Decision and Order which had denied the Respondents' motion seeking to dismiss the petition upon the ground that the petitioners lacked standing upon which to maintain this action. Previously, this Court had ordered that Respondent Leach was to file and serve a Verified Answer to the petition by not later than March 25, 2016, and Respondent Cortlandville was ordered to file and serve a Verified Answer and a certified record of the proceedings by not later than March 31, 2016. Respondent Leach submitted a Verified Answer dated March 23, 2016, and Respondent Cortlandville submitted a Verified Answer dated March 24, 2016. However, Respondent Cortlandville did not file and serve a certified transcript of the proceedings as directed. Thereafter, Petitioner Jenkins responded by Reply Affidavit dated April 2, 2016.

On April 7, 2016, in Cortland County Supreme Court, the petitioners appeared by counsel as did respondent Cortlandville. At that time counsel for respondent Cortlandville submitted what was purported to be non-certified records from the proceedings which had occurred before the various boards with respect to the approval of respondent Leach's application. Counsel for the petitioners was provided an opportunity to review the records and, by letter dated April 11, 2016, the

petitioners, by counsel, raised issues with regards to the records but thereafter concluded that any omitted records were otherwise available to the court. Upon such records the following reflects the Decision and Order of this Court.

With respect to zoning, it is axiomatic that a use which is not permitted or is otherwise prohibited within a particular district or zone by local zoning regulations or restrictions may not be used for such purpose absent a use variance. A "use variance," defined at Town Law §267(1)(a), "shall mean the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations." Thus, while a particular use may be prohibited from operation within a particular zone or district based upon the prevailing zoning regulations the governing authority may issue a use variance permitting such prohibited use under certain, yet very limited, circumstances. Historically, the New York State Court of Appeals in the 1939 seminal case of *Otto v. Steinhilber*, 282 NY 71, addressed the standard of review with respect to the application for area variances and what is now considered the standard of review regarding use variances. Those particular standards had subsequently been codified in Town Law §267-b and reflect the strict standards which need be addressed and satisfied before a use variance may be granted by a ZBA. The burden upon the applicant has been characterized as substantial given that the grant of a use variance runs counter to the intended use of a given area of land as set forth in the controlling zoning regulations as adopted by the local municipality.

The codification of the principals enunciated in *Otto* are contained within New York State Town Law Article 16 entitled "Zoning and Planning," which provides the mechanism by which a ZBA may grant a use variance. Section 267-b thereof sets forth the standard upon which a ZBA may review an application for a use variance and grant such if the application complies with the various provisions contained therein. Specifically, the ZBA's review of an application for a use variance must address the following provisions contained within Section 267-b(2), as follows:

(a) The board of appeals, on appeal from the decision or determination of the administrative official charged with the enforcement of such ordinance or law, shall have the power to grant use variances, as defined herein.

(b) No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that the lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted,

will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created.

(c) The board of appeals, in the granting of use variances, shall grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proven by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

As is relevant to the present action it has been represented that the district in which the Leach properties are presently situate is considered to be a "B-2" district as set forth in the 1985 Zoning Local Law of the Town of Cortlandville, which is otherwise described to be a Highway Commercial Business District. (L.L. No. 1-1986). This area, in addition to being so zoned, is also considered to be located within Area II of the Aquifer Protection District. The Cortland County Planning Department (CCPD), in its correspondence to the Cortland County Planning Board, dated October 16, 2015, addressed the Leach application regarding the proposed expansion of the property's present use by the addition of an access road and additional parking space. The CCPD noted at page 5 of this correspondence the following:

> A use variance is required as the existing use of the property (trash transfer station) is not a permitted use in the B-2 District but has been granted a use variance. The addition of an access road, parking area and equipment storage for this business is considered an expansion of this use. A use variance is required to expand a use which previously required a use variance. In order for a use variance to be granted, the applicant must show that applicable zoning regulations and restrictions have caused unnecessary hardship. An aquifer protection district special permit is also required as this property is within Area II of the Aquifer Protection District while solid waste disposal facilities are prohibited in Areas I and II of the Aquifer Protection District and as the project cost would exceed $150,000.

Therefore, it was clear that the Leach application would, in order to move forward, need to obtain both a use variance from the ZBA as well as an aquifer protection district special permit from the Town Board.

With respect to the use variance application before the ZBA, this body was authorized to grant a use variance if its review and actions conformed with Town Law §267-b. This court, upon a review of the submissions by the applicant, Leach, as well as the minutes of the October 27, 2015, meeting of the ZBA wherein the use variance was authorized, finds that the ZBA failed to properly comply with the requirements of Town Law §267-b.

Specifically, the ZBA was required to make findings, based upon submitted evidence, that the requirements of Section 267-b(2)(b) had been satisfied which would support or justify the issuance of the use variance. Here, the records are devoid of any competent evidence supporting

the findings by the ZBA as set forth in the "Discussion/Decision" portion of the October 27, 2015, minutes. The findings of the ZBA generally can, at best, be described as merely conclusory without any substantive support.

In reviewing the ZBA's required findings it is evident that there was no showing that the zoning regulations and/or restrictions resulted in or caused an "unnecessary hardship" to the applicant. The applicant did not demonstrate that he "cannot realize a reasonable return" as there was no showing that there existed a lack of return or, as statutorily required, a demonstrated substantial lack of return as there was no "competent financial evidence" presented to the ZBA by the applicant as is required by the statute. Such a demonstration must be made by "dollars and cents" proof in order to satisfy this burden which, upon a review of the record, the applicant failed to do. (See *Village Board of the Village of Fayetteville v. Jarrold,* 53 NY2d 254 (1981)). So, too, there was no showing that the "hardship," if there be any, was unique or otherwise did not apply to the greater portion of the neighborhood in which the project was to be constructed. It may very well be the case that the proposed extension of the existing use of the property would not change or otherwise adversely impact upon the "essential character of the neighborhood" given that the Suit-Kote asphalt facilities are nearby as are other commercial business operations. This court finds no basis upon which to conclude otherwise and defers to the ZBA with respect to this particular finding as the ZBA would be properly possessed of such relevant information to make such an informed decision. However, the ZBA failed to properly address such a finding in the record as to the basis upon which such a finding was made.

With respect to the proposed access road, equipment storage and parking area, this particular expansion would be an accessorial use to the permitted non-conforming trash transfer station. Such a use would necessarily require the issuance of a use variance given the zoning applicable to the subject property. However, as the restrictions and regulations were in existence prior to the purchase of this additional parcel, the applicant created the hardship himself and cannot now raise such hardship under these circumstances. (See Section 267-b(2)(b)(4)). Therefore, it is clear, that the hardship, if such were to be found at all, was self-created by the applicant. No rational finding to the contrary can be found to exist upon the record before this court or that which was before the ZBA.

In addition, with respect to the proposed extension of the trash transfer facility, the Third Department, Appellate Division, found in *Conte v. Town of Norfolk Zoning Board of Appeals*, 261 AD2d 734, 736 (1999), that "a [use] variance runs with the land...and may not be created merely to ease the personal difficulties of the current owner." Here, other than a representation that the access road, equipment storage and additional parking would provide a convenience to the owner of the trash transfer station, no demonstration had been made, according to the records available, to find that there is any necessity pursuant to §267-b which would warrant the issuance of the instant use variance.

Therefore, upon the record before this Court, it is evident that the applicant did not satisfy the requirements of Town Law §267-b. As such, the ZBA did not have before it a record to support

its finding of October 27, 2015, and such is, then, arbitrary and capricious, and without support n the record.

In reviewing the Planning Board's determination of October 27, 2015, it is evident that the Board must comport its conduct with Section 178-75(A) of the Town of Cortlandville Zoning Law. This particular provision provides that the Board, before approving a conditional permit, must "make findings of fact consistent with the provisions of this chapter." Upon a review of the minutes of this meeting such are bereft of any demonstrated compliance with the above-referenced zoning law. While it is clear that the Board "incorporated Items 1 thru 8 of the Cortland County Planning Board's Resolution No. 15-30 of 21 October 2015" there appears to have been no independent review by the Board regarding the nine enumerated components of Section 178-75(A) of the zoning law. The Resolution referenced by the Board did not specifically address these nine components, which the Board was required to do, but merely recommended the approval of the various applications "contingent" upon compliance with these enumerated matters. Of significance to this court is that item number eight of these contingencies required "compliance with SEQRA [State Environmental Quality Review Act] requirements" before approval was to be granted. Such had not occurred at the time of the October 27, 2015, approval with respect to SEQRA and the Board's actions therefore were not consistent with the Cortland County Planning Board's recommendation. With respect to petitioners' assertion that the Board did not prepare written findings or otherwise address the enumerated components of Section 178-75(A) of the Zoning Law, it is clear that a planning board must issue a written determination setting forth findings of fact which support its decision. (See Highland Brooks Apartments v. White, 40 AD2d 178, 4th Dpt. 1972). Here, the Board failed to support its determination with such written findings of fact.

Therefore, the Board's failure to comply with the recommendations of the County Planning Board and, more importantly, the Board's failure to set forth its own findings of fact as required by Section 178-75 do not provide a basis upon which this court may conclude that the Planning Board acted in conformity with applicable provisions of law. The Planning Board's determination therefore is deemed to be arbitrary and capricious, and is thereby a nullity *ab initio.*

Finally, petitioners here assert that the Board's negative SEQRA declaration must be annulled as contrary to the letter of SEQRA. Respondents oppose such relief.

New York State Environmental Conservation Law Article 8 entitled "Environmental Quality Review" seeks to promote the state's declared policy to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state." (ECL §8-0101). The Legislature further found and declared, at ECL §8-0103, that:

> It is the intent of the legislature that the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy. Social, economic, and environmental factors shall be considered together in reaching decision on proposed activities.
>
> It is the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.
>
> It is the intent of the legislature that all agencies which regulate activities of individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage. (ECL §8-0103(7-9).

With respect to those "agencies" affected by this particular legislation it is without question, and such has not been raised here, that the Town of Cortlandville ZBA, Planning Board and Town Board satisfy the definition of an "agency" pursuant to SEQRA. (See ECL §8-0105(2, 3). So, too, there can be no question that, the issuance of a use variance, a conditional permit, the approval of a subdivision and the approval of an Aquifer Protection District Special Permit, are, individually, an "action" as defined within Article 8 (See ECL §8-0105(4).

The Town Board, as the lead agency, was required, with respect to an Unlisted Action and before issuing a negative declaration, as was done here, to comply with Section 617.7 to determine whether there was any significant adverse environmental impact as a result of the project. In so doing, the lead agency was required to review and consider the criteria contained in Section 617.7(c) and, pursuant to Section 617.7(b)(4) "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation." Here, the Town Board, by it's resolution, approved the Aquifer Protection Permit and the subdivision of the Leach properties. However, the Town Board, not unlike the ZBA and the Town Planning Board, failed to comport its conduct with the requirements of SEQRA as there was no written "reasoned elaboration" to support its Resolution declaring that the project would have a negative impact.

The suggestion that the Town's processes sequentially and collectively complied with SEQRA is illusory. The ZBA had addressed the issuance of a use variance without conducting an environmental review regarding any adverse impact pursuant to SEQRA, apparently deferring such determination to the Town Board. The Town Planning Board, while granting a conditional permit, did not conduct a SEQRA review again, apparently, deferring to the Town Board to conduct such. The Town Board, while reviewing the aquifer protection district special permit and the subdivision application, noted within its resolutions that it was addressing SEQRA exclusively with respect to the aquifer protection district special permit and no other permits or variances as granted by the ZBA or the Planning Board. At the November 18, 2015, Town Board

minutes Councilman Rocco expressed concerns regarding continued expansion of a business within a flood zone. Councilman Proud "clarified that the Town Board **does not** grant variances but that the ZBA grants variances. Attorney Folmer suggested Councilman Rocco pose his questions to the ZBA." (Emphasis added). Thus it was quite clear from the minutes and the nature of the resolutions as passed that the Town Board, as the purported lead agency for SEQRA, did not review environmental impacts relating to the approvals of the ZBA and the Town Planning Board but only as to the aquifer protection district special permit and subdivision application which was then before it. As such the Town Board did not review SEQRA on behalf of the ZBA or the Town Planning Board but, rather, only with respect to its limited review of the special permit and the subdivision application. Within such limited application the Town Board failed to comply with the requirements of SEQRA. While it is appropriate that this court, in reviewing the merits of the Town Board's action as it pertains to SEQRA, must be mindful that "it is not the role of the courts to weigh the desirability of any [SEQRA] action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively," (*Basha Kill Area Assn. v. Planning Bd. of Town of Mamkating*, 46 AD3d 1309, 1311-1312, 3rd Dpt. 2007; citing *Matter of North Country Citizens for Responsible Growth, Inc., v. Town of Postdam Planning Bd.*, 39 AD3d 1098, 1103, 2007, quoting *Matter of Jackson v. New York Urban Dv. Corp.*, 67 NY2d 400, 416, 1986), this court cannot conclude that the Town Board, as lead agency, "took the requisite 'hard look at the potential environmental impacts and [made] a reasoned elaboration of its findings.'" (*Basha Kill*, supra at 1312; internal citations omitted).

Therefore, upon the record before this Court it is

ORDERED, that the grant of the use variance to Respondent Leach by Respondent Town of Cortlandville Zoning Board of Appeals dated October 27, 2016, is hereby VACATED and ANNULLED *ab initio;* and it is

ORDERED, that the grant of the conditional permit to Respondent Leach by Respondent Town of Cortlandville Planning Board dated October 27, 2015, is hereby VACATED and ANNULLED *ab initio*; and it is

ORDERED, that the grant of subdivision approval and the issuance of an Aquifer Protection District Special Permit to Respondent Leach by Respondent Town of Cortlandville Town Board dated November 18, 2015, is hereby VACATED and ANNULLED *ab initio.*[1]

[1] Given the foregoing determination this court need not address the remaining issues as raised by the petitioners.

Enter.

DATED: May 23, 2016
Wampsville, New York

Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice
County of Cortland